Supreme Court, U.S.
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No. 92-356

In The

Supreme Court of the United States

October Term, 1992

KENNETH B. MUMAW,

Petitioner,

v.

NURAD, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that a person who owned a facility at a time when hazardous substances were leaking from underground tanks may be liable for cleanup costs as a "person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" under Section 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Jurisdiction 1

Pertinent Statutes 1

Statement of the Case 1

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) 6

Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784 (D. N.J. 1989) 6

CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783 (W.D. Mich. 1989) 6

CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991) 7

Ecodyne Corp. v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1989) 7, 8

Emhart Indus., Inc. v. Duracell Int'l, Inc., 665 F. Supp. 549 (M.D. Tenn. 1987) 6, 7

Guidice v. BFG Electroplating and Mfg. Co., Inc., 732 F. Supp. 556 (W.D. Pa. 1989) 6, 7

Hatco Corp. v. W. R. Grace & Co., 1992 U.S. Dist. LEXIS 11462 (D. N.J. 1992) 7

In Re Consolidated Land Disposal Regulation Litigation, 938 F.2d 1386 (D.C. Cir. 1991) 5

In Re Diamond Reo Trucks, Inc., 115 B.R. 559 (Bankr. W.D. Mich. 1990) 8

In Re Hemingway Transport, Inc., 108 B.R. 378 (Bankr. D. Mass. 1989) 6, 7

Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984) 7

TABLE OF AUTHORITIES – Continued

Page

Pantry, Inc. v. Stop-N-Go Foods, Inc., 1992 WL 153075 (S.D. Ind. 1992) 7

Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991) 8

Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990) 7

3550 Stevens Creek Associates v. Barclays, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2014 (1991) 8

United States v. Diamond Shamrock Corp., No. Civ. C80-1857, 12 Envtl. L. Rep. 20,819, 17 E.R.C. 1329 (N.D. Ohio 1981) (Westlaw, DCT) 7

United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985) 6

United States v. Petersen Sand and Gravel, Inc., 1992 U.S. Dist. LEXIS 13268 (N.D. Ill. 1992) 8

United States v. Price, 523 F. Supp. 1055 (D. N.J. 1981), *aff'd*, 688 F.2d 204 (3rd Cir. 1982) 7

United States v. Waste Industries, Inc., 734 F.2d 159 (4th Cir. 1984) 5

Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distr. Corp., 737 F. Supp. 1272 (W.D. N.Y. 1990) 6

STATUTES

Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2796 (1976), codified as amended at 42 U.S.C. § 6901 *et seq.*

§ 1003, 42 U.S.C. § 6902 1

§ 1004(3), 42 U.S.C. § 6903(3) 4

TABLE OF AUTHORITIES – Continued

Page

Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified as amended at 42 U.S.C. § 9601 *et seq.*

§ 101(29), 42 U.S.C. § 9601(29) 3

§ 101(35), 42 U.S.C. § 9601(35) 1, 9

§ 107, 42 U.S.C. § 9607 2

§ 107(a)(2), 42 U.S.C. § 9607(a)(2) ..... *passim*

§ 107(b)(3), 42 U.S.C. § 9607(b)(3) 1, 8

28 U.S.C. § 1254(l) 1

OTHER AUTHORITIES

Fed. R. Civ. P. 54(b) 3

Sup. Ct. R. 10.1 5

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 29, 1992. A timely petition for writ of certiorari was filed on August 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The statutes involved are reproduced in Appendix C to the Petition. Nurad disagrees that 42 U.S.C. § 6902 (objectives and national policy under the Resource Conservation and Recovery Act ("RCRA")) and 42 U.S.C. § 9601(35)(C) (defining the limits of the third party defense to liability under Section 107(b)(3) of CERCLA) are relevant to the question presented.

STATEMENT OF THE CASE

Nurad, Inc. ("Nurad")[1] has spent more than $250,000 since 1988 to address hazardous substance contamination at its property in Baltimore, Maryland ("Site"). Soil and groundwater at the Site were contaminated when discarded solvents leaked from long-abandoned underground storage tanks. Nurad is currently studying the full extent of contamination and must still design and implement a final cleanup. Kenneth B. Mumaw

[1] Nurad is a wholly-owned subsidiary of Dover Technologies, Inc. which is wholly-owned by Dover Corp.

("Mumaw"), who sold the Site to Nurad in 1976, seeks to avoid liability for his share of the cleanup costs.

The Site has had several owners since the Wm. E. Hooper & Sons Co. ("Hooper") last used the tanks in 1962. A wholly-owned company of real estate investor Frank Nicoll ("Nicoll") bought Hooperwood Mills, of which the Site was a part, from Hooper in 1963. Mumaw, who had worked at Hooperwood Mills in various capacities since 1933 and was in charge of maintenance of the facilities during Nicoll's ownership, bought Hooperwood Mills from Nicoll in 1976. Mumaw subdivided the Mill and sold the Site to Nurad the same day. Mumaw still owns most of the Mill. Neither Nicoll, whose insurer instructed him to close the tanks in 1965, nor Mumaw, whose personal knowledge of Hooper's use of the tanks for solvent storage dates back to the 1940s, ever responded to the environmental threats posed by the discarded solvents.

Nurad never used the tanks and did not even know they contained hazardous substances until October 1988. Upon learning the tanks' contents, Nurad undertook an immediate emergency response. Thereafter, it filed a private cost recovery action in the United States District Court for the District of Maryland under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and certain common law claims against the prior owners of the Site and against former tenants.

On cross-motions for summary judgment as to liability, the district court determined that Mumaw was not

liable to Nurad on the sole ground that no "active disposal" occurred during his ownership. Nurad's motion for summary judgment against the now-defunct Hooper Co. and the summary judgment motions filed by the otner defendants were also granted.[2] The district court authorized an immediate appeal in accordance with Fed. R. Civ. P. 54(b).

The Fourth Circuit reversed the grant of summary judgment in favor of Mumaw; it affirmed the balance of the District Court's judgment. Pet. A-40. In an unanimous opinion, Judge Wilkinson rejected the District Court's construction of Section 107(a)(2) of CERCLA which imposes liability for cleanup costs on any person who owns or operates a facility at the time of hazardous substance disposal. CERCLA defines "disposal" by reference to the definition of "disposal" in the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 9601(29). Under both statutes, "disposal" means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment

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[2] Nicoll did not move for summary judgment in the district court. In denying Nurad's motion for summary judgment against Nicoll, the District Court concluded, as it did for Mumaw, that Nicoll was not liable solely because there was no active disposal during his ownership, notwithstanding its conclusion that Nicoll "was aware of the USTs and their contents, . . . recognized the need to empty them, . . . [and] had the capacity and authority to properly dispose of the hazardous substances in [the USTs]." Pet. A-89.

> or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Based on Congress' inclusion of "leaking" in the statutory definition of "disposal," the Court of Appeals concluded that Section 107(a)(2) of CERCLA imposes liability "not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking.' " Pet. A-34. The court further determined that "the record supports the conclusion that . . . Mumaw owned the facility at a time when the [solvents] were 'leaking' from the tanks." *Id.* Therefore, Mumaw was liable to Nurad under Section 107(a)(2) and summary judgment should have been entered in favor of Nurad rather than Mumaw. Pet. A-40.[3]

ARGUMENT

Section 107(a)(2) of CERCLA imposes liability on persons who own property at the time of hazardous substance disposal. As the Court of Appeals correctly held, the statute expressly equates disposal with leaking. It also correctly determined on this record that underground storage tanks were leaking hazardous substances during Mumaw's ownership. The court therefore concluded that

[3] Parties to the proceedings before the circuit court were Hooper and two of its officers and directors, Lawrence Hooper and James E. Hooper, Jr., Kenneth Mumaw, and tenants Allstates Moving & Storage and its president Raymond B. McMillan, Universal Laboratory Installations, Inc. and Monumental Millwork. Nicoll was not a party to the appeal.

there was an adequate factual predicate for liability. The decision below falls squarely within the terms of Section 107(a)(2) on its facts and is not contradicted by any other circuit court decision. No exercise of this Court's discretionary review is warranted.

A. The decision below is the only case in which a federal appellate court has decided whether a former owner is liable under Section 107(a)(2) for leakage of hazardous substances from storage tanks during his ownership. Consequently, no conflict among decisions of the courts of appeals on this issue exists.[4]

Petitioner has argued instead that there is a conflict among the *district* courts on this question. The existence of a conflict among district courts, however, is not one of the reasons identified in this Court's rules for the exercise of its discretionary certiorari jurisdiction. *See* Sup. Ct. R. 10.1. No circuit court has ever adopted the view of the decisions cited by Petitioner. If and when that occurs, that

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[4] In cases arising under RCRA, both the Fourth Circuit and the District of Columbia Circuit earlier determined that the equation of "disposal" with "leaking" means that disposal can be continuous. *See In Re Consolidated Land Disposal Regulation Litigation*, 938 F.2d 1386, 1389 (D.C. Cir. 1991) (deferring to the Environmental Protection Agency's interpretation of "disposal" which includes the continuing presence of waste at a facility because "such hazardous wastes or constituents may continue 'leaking' or 'may enter the environment or be emitted . . . or discharged' . . . into the environment"); *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984) (concluding that disposal includes not only active conduct, but also a physical state of hazardous waste in repose and the occurrence of waste moving in the environment after being placed in a state of repose).

issue may achieve the importance needed to warrant this Court's consideration. That is not this case.

B. Further, Petitioner overstates the purported conflict among the district courts. The vast majority of the United States district courts have adopted the Fourth Circuit's position that active conduct is not a prerequisite to "disposal" under either RCRA or CERCLA.[5] They also

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[5] *See e.g., Westwood Pharmaceuticals v. National Fuel Gas Distr.*, 737 F. Supp. 1272, 1278 (W.D. N.Y. 1990) (depositing hazardous substances into subsurface receptacles, even if they are structurally sound and failing to remove all such substances before relinquishing the site constitutes disposal under CERCLA); *In Re Hemingway Transport, Inc.*, 108 B.R. 378, 382 (Bankr. D. Mass. 1989) (the presence of drums that are "deteriorating and thus 'leaking' due to their exposure to the elements over a period of years" is disposal sufficient to impose liability under Section 107(a)(2)), *quoting American Mining Congress v. EPA*, 824 F.2d 1177, 1196 (D.C. Cir. 1987) (Mikva, J., dissenting) ("the definition [of disposal] is functional: waste is disposed under this provision if it is put into contact with land or water in such a way as to pose the risks to health and the environment that animated Congress to pass RCRA"); *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 791-92 (D.N.J. 1989) (PCB spillage constitutes disposal under CERCLA); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783 (W.D. Mich. 1989) (failure to operate purge wells which permitted the spread and migration of previously placed hazardous waste constitutes disposal under CERCLA); *Guidice v. BFG Electroplating and Mfg. Co., Inc.*, 732 F. Supp. 556, 564 (W.D. Pa. 1989) (presence of rusty drums which lacked lids but contained hazardous waste was sufficient to constitute disposal under CERCLA); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987) (leaching of hazardous substances through the soil and into groundwater constitutes disposal under CERCLA); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1399 (D.N.H. 1985) (CERCLA " 'disposal' includes within its purview leaking,

conclude that Section 107(a)(2) embraces interim owners, even if no "active" disposal occurred during their tenures.[6] Two additional district courts outside the Fourth Circuit have cited the circuit court's decision below with approval.[7]

Moreover, the minority view reflected in the three district court cases cited by Petitioner is distinguishable on their facts and thus not in conflict with the decision

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which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions.") (quoting *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982)); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1436 (S.D. Ohio 1984) (disposal under RCRA need not result from any affirmative action by the defendant); *United States v. Diamond Shamrock*, No. Civ. C80-1857, 12 Envtl. L. Rep. 20,819, 17 E.R.C. 1329, 1333 (N.D. Ohio 1981) (Westlaw, DCT) ("A [RCRA] 'disposal' clearly requires no active human conduct"); *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) ("RCRA disposal need not result from affirmative action by the defendants but may be the result of passive inaction").

[6] *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 579 (W.D. Mich. 1991); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659 (E.D. Cal. 1990) (specifically rejecting the rationale of *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989) on which Petitioner relies); *Guidice v. BFG Electroplating and Mfg. Co., Inc.*, 732 F. Supp. 556 (W.D. Pa. 1989); *In Re Hemingway Transport, Inc.*, 108 B.R. 378 (Bankr. D. Mass. 1989); *Emhart Industries, Inc. v. Duracell Int'l Inc.*, 665 F. Supp. 549 (M.D. Tenn. 1987).

[7] *Hatco Corp. v. W.R. Grace & Co.*, 1992 U.S. Dist. LEXIS 11462 (D. N.J. 1992); *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 1992 WL 153075 (S.D. Ind. 1992) (construing substantially identical state law definition of disposal to include leakage from underground tanks, citing the court of appeals' decision below as persuasive authority).

below. Each of those cases determined that continued migration and leaching of contaminants after the initial placement of wastes at a site does not constitute disposal as defined by CERCLA.[8] Despite the questionable merit of that interpretation, it is unlikely that this Court would reach that issue in this case because, as the Fourth Circuit read the record, the tanks in this case were *leaking* and thus disposing of additional contaminants into the environment during Mumaw's ownership.

C. Finally, the district courts excluded interim owners from liability under Section 107(a)(2) in the cases cited by Petitioner because they thought that a contrary decision would subject to liability every person in the chain of title to contaminated property, a concern Petitioner also raises. But Congress has enacted a specific provision in Section 107(b)(3) to protect "innocent" interim owners. Under that Section, an interim owner can avoid CERCLA liability by proving, *inter alia*, that the hazardous substance release was caused solely by the act or omission of an unrelated third party and that he took

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[8] *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984 (E.D. Mich. 1991); *In Re Diamond Reo Trucks, Inc.*, 115 B.R. 559 (Bankr. W.D. Mich. 1990); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989). *United States v. Petersen Sand and Gravel, Inc.*, 1992 U.S. Dist. LEXIS 13268 (N.D. Ill. 1992), was decided after the Petition was filed in this case and joins the minority view. *3550 Steven Creek Associates v. Barclays*, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2014 (U.S. 1991), cited by Mumaw, is entirely inapposite. The Ninth Circuit there held that asbestos in non-waste form is not disposed within the meaning of CERCLA when it is incorporated into building materials. In other words, the use of a commercial product does not meet the statutory definition of "disposal."

due care with respect to the hazardous substances.[9] Truly "innocent" interim owners who are *potentially* liable as owners at the time of disposal can avoid CERCLA liability by interposing the third-party defense. On the other hand, as the Fourth Circuit points out, owners who ignore environmental threats on their properties cannot and should not avoid liability as the minority view would allow.

In sum, the decision below is consistent with the terms of the statute and follows the prevailing judicial interpretation of Section 107(a)(2) which imposes liability on defendants who own facilities when hazardous substances are leaking. To construe the statute differently would both ignore its plain terms and reward property owners who are indifferent to environmental threats on their properties while penalizing more conscientious owners, like Nurad, who perform voluntary cleanups.

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[9] Section 101(35) extends this "third-party defense" to defendants who had no reason to know the property was contaminated when they acquired it. Section 101(35)(C), on which Petitioner relies, provides that this "innocent purchaser" variation of the defense will not be available if the defendant discovers contamination during his ownership and fails to disclose it to a purchaser. To the extent Section 101(35)(C) has any bearing on the issues in this case, it is restricted to the Section's implicit acknowledgement that interim owners are potentially liable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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